

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	
)	
Core Communications, Inc.)	WC Docket No. 03-171
)	
Petition for Forbearance under 47 U.S.C. §)	
160(c) from Application of the ISP Remand)	
Order)	

**OPPOSITION TO QWEST CORPORATION'S
MOTION TO WITHDRAW RECONSIDERATION PETITION**

Core Communications, Inc. hereby opposes Qwest Corporation's ("Qwest's") apparent motion to withdraw its petition for reconsideration. Because (1) Core "joined issue" with Qwest's petition and (2) parties have no obligation to file "me too" reconsideration petitions once filed another party, Qwest may not unilaterally withdraw its petition for reconsideration, as it purports to do in its January 23, 2007 motion.¹ Under no circumstance could Qwest's effort to withdraw the reconsideration petition it filed well over two years ago divest the Commission of authority to address the issues presented therein, which Core joined, in particular the statutory issue whether, by operation of section 160(c), Core's forbearance petition was "deemed granted" by operation of law on October 11, 2004.

First, in the United States Court of Appeals for the District of Columbia Circuit ("D.C. Circuit"), the Commission acknowledged that Qwest's reconsideration petition raised the issue whether Core's forbearance petition was "deemed granted" by operation of law and that Core had "joined issue" on this score by filing a pleading in the reconsideration proceeding—meaning that Core had itself raised the issue in the reconsideration proceeding. The Commission

¹ Tellingly, Qwest cites to neither case law nor Commission rule to support its unilateral effort to withdraw its reconsideration petition.

also informed the D.C. Circuit that the Commission would, in the reconsideration proceeding, resolve the issue of whether Core's petition was "deemed granted" by operation of law. As the Commission told the Court:

To avoid the possibility that Core's forbearance petition may have been granted in its entirety, therefore, Qwest asked the Commission on reconsideration to reaffirm the *Forbearance Order* insofar as it had denied Core's forbearance petition in part. ***Core then directly joined issue with Qwest, contending before the Commission that its (Core's) forbearance petition was "deemed granted by operation of law" and that "the Commission may not reach back in time on reconsideration to take away what was granted by Congress by operation of law." [T]herefore, the jurisdictional issue that Core is presenting on judicial review plainly is before the FCC in the pending reconsideration proceeding.***

FCC Motion To Hold Case In Abeyance, DC Cir. Case No 04-1368 (Jan. 28, 2004 (hereinafter, "FCC's Abeyance Motion")). The FCC's Abeyance Motion asked the D.C. Circuit "to hold these consolidated cases in abeyance pending the completion of agency reconsideration proceedings" because the "*pending petitions for reconsideration present to the FCC essentially the same arguments* that the petitioners will present to the Court." FCC's Abeyance Motion, p. 1 (emphasis added). The FCC's Abeyance Motion could not have been clearer in explaining that Core's section 160(c) issue was adequately presented in the pending reconsideration proceeding.

Second, the D.C. Circuit ultimately ruled that it could not exercise judicial review because "**the Commission has not yet ruled on Qwest's petition for reconsideration, which remains pending before it.**" *In re Core Commc'ns, Inc.*, D.C. Cir. 04-1368, 2006 WL 3069547 (per curiam Oct. 13, 2006) (emphasis added). The Court explained that because Core failed "to await the Commission's disposition of" the reconsideration proceeding before seeking judicial review and opposed the Commission's Abeyance Motion, the Commission was not yet afforded an opportunity pass on the section 160(c) issue, and without the Commission's interpretation of section 160(c), the D.C. Circuit could not review it. *Id.*

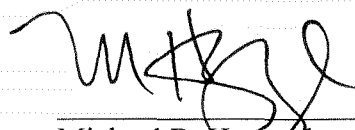
For support, the D.C. Circuit cited *Petroleum Communs, Inc. v. FCC*, 22 F.3d 1164, 1170-1171 (D.C. Cir. 1994). In *Petroleum* a party petitioned for judicial review of an order **while another party's petition for reconsideration was pending**, and the D.C. Circuit held that it could not review the issue presented to it because the reconsideration proceeding was not yet completed. *Id.* ("The FCC has yet to dispose of this petition, but claims that a draft order is currently undergoing internal review. Had the Commission already completed its review of this petition for partial reconsideration, we would find the exhaustion requirement vicariously satisfied as to petitioners.") (footnote omitted). Analogizing Core's petition for judicial review to the one in *Petroleum*, the Court concluded that judicial review could not be had because **"the FCC has not yet disposed of"** the pending reconsideration proceeding. *In re Core Commc'ns, Inc.*, D.C. Cir. 04-1368, 2006 WL 3069547 (per curiam Oct. 13, 2006).

Consistent with *Petroleum*, parties need not file "me too" petitions for reconsideration once another party presents an issue to the Commission in a reconsideration proceeding. Rather, once a party raises an issue in a reconsideration petition, the other parties are entitled to rely on that petition as having opened the matter for reconsideration. In fact, the D.C. Circuit has long held that, so long as *any* party has given the Commission an opportunity to pass on an issue in an reconsideration petition, any other party may obtain judicial review, notwithstanding 47 U.S.C. § 405, because parties are not required to file "me too" petition once one party has filed for reconsideration on an issues. *Office of Communication of United Church of Christ v. FCC*, 465 F.2d 519, 523-524, (D.C. Cir. 1972); *Time-Warner Entm't Co. v. FCC*, 144 F.3d 75, 79-80 (D.C. Cir. 1998); *Bartholdi Cable Co., Inc. v. FCC*, 114 F.3d 274, 280 (D.C. Cir. 1997) (emphasis added). In essence, the D.C. Circuit recognizes that once a party files a reconsideration petition, other parties are entitled to rely on its substance without filing "me too"

petitions. It follows that the party who filed the petition cannot unilaterally terminate a pending reconsideration proceeding.² Otherwise, in every case in which a reconsideration petition is filed, all other interested parties would be forced to file duplicative petitions for reconsideration as a prophylactic measure to avoid what Qwest attempts here – unilaterally eliminating from the Commission’s consideration a long-pending petition for reconsideration in which Core by the Commission’s admission “joined issue.” Accordingly, Qwest’s effort to withdraw unilaterally its reconsideration petition must be rejected by the Commission.

Consistent with the foregoing, the Commission should deny Qwest’s apparent motion to withdraw its petition for reconsideration, and resolve that petition on the merits.

Respectfully submitted,



Michael B. Hazzard
Womble Carlyle Sandridge & Rice, PLLC
1401 Eye Street, NW, Seventh Floor
Washington, DC 20005
(202) 857-4540


Core Communications, Inc.

January 30, 2007

² The underlying policy here is similar to that regarding requests for jury trials under Rule 38 of the Federal Rules of Civil Procedure. Under that rule, and related case law, a plaintiff may not unilaterally withdraw its request for a jury trial once a defendant has entered a case. Because the defendant is entitled to rely on the plaintiff’s demand for a jury trial without making a “me too” demand, the law says that the plaintiff may not unilaterally withdraw its demand. *Dell’Orfano v. Romano*, 962, F.2d 199, 202 (2d Cir. 1992) (holding that party who initially demanded jury trial may not unilaterally withdraw demand because other party is “entitled to rely on [opponent’s] jury demand to preserve his own right to a jury trial”).

CERTIFICATE OF SERVICE

I, Edilma M. Carr, do hereby certify that I have caused the foregoing "Opposition to Qwest Corporation's Motion to Withdraw Reconsideration Petition" to be: 1) filed with the FCC, via its Electronic Comment Filing System in WC Docket No. 03-171; 2) served, via email on the FCC's duplicating contractor, Best Copy and Printing, Inc. at fcc@bcpiweb.com; and 3) served via First Class United States Mail, postage prepaid, on the parties listed on the following service list.



Edilma M. Carr

January 30, 2007

PARTIES:

John Engle
Nandan M. Joshi
Office of General Counsel
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Alan Buzacott
MCI
1133 19th Street, N.W.
Washington, D.C. 20036

Stephen L. Earnest
Richard M. Sbarata
BellSouth Corporation
Suite 4300
675 West Peachtree Street, N.E.
Atlanta, GA 30375

Jim Lamoureux
Gary L. Phillips
Paul K. Mancini
SBC Communications Inc.
4th Floor
1401 I Street, N.W.
Washington, DC 20005

John M. Goodman
Verizon Telephone Companies
1515 North Courthouse Road
Arlington, VA 22201

Richard M. Rindler
Michael W. Fleming
Swidler Berlin Shereff Friedman, LLP
Suite 300
3000 K Street, N.W.
Washington, D.C. 20007

Brad E. Mutschelknaus
John J. Heitmann
Kelley Drye & Warren LLP
3050 K Street, N.W.
Suite 400
Washington, D.C. 20037

Patrick W. Pearlman
West Virginia Public Service
Commission
Seventh Floor, Union Building
723 Kanawaha Boulevard East
Charleston, WV 25301

Gary L. Field
Loomis, Ewert, Parsley, Davis &
Gotting, PC
Suite 1000
232 S. Capitol Avenue
Lansing, MI 48933-1525

Chris Van de Verg
Core Communications, Inc.
Suite 302
209 West Street
Annapolis, MD 21401

Karen Brinkman
Latham & Watkins
Suite 1000
555 11th Street, N.W.
Washington, D.C. 20004

Frank Simone
AT&T Corp.
Suite 1000
1120 20th Street, N.W.
Washington, D.C. 20036

John T. Nakahata
Harris, Wiltshire & Grannis
Suite 1200
1200 18th Street, N.W.
Washington, D.C. 20036

James W. Olson
United states Telecom Association
Suite 600
1401 H Street, N.W.
Washington, D.C. 20005

Andrew D. Crain
Robert B. McKenna
Michael B. Adams, Jr.
*Qwest Corporation
607 14th Street, Suite 950
Washington, D.C. 20005

**Via Hand Delivery*